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Attorney for Plaintiff Preston Smith

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

**PRESTON SMITH, an
individual,**

Plaintiff,

vs.

**CITY OF BURBANK,
BURBANK POLICE
DEPARTMENT, BURBANK
POLICE DEPARTMENT
OFFICER GUNN; BURBANK
POLICE DEPARTMENT
OFFICER BAUMGARTEN;
BURBANK DEPARTMENT
POLICE OFFICER EDWARDS,
AND DOES 1 TO 100, inclusive,**

Defendants.

Case No.: CV 10-8840 VBF (AGRx)

Honorable Valerie Baker Fairbank

**PLAINTIFF'S OPPOSITION TO
MOTION FOR JUDGMENT ON
THE PLEADINGS**

**APPLICATION FOR AN ORDER
DENYING, DEFERRING OR
CONTINUING DEFENDANT'S
MOTION FOR JUDGMENT ON
THE PLEADING**

**DECLARATIONS OF PLAINTIFF
PRESTON SMITH AND MAX A.
SAULER, ESQ., IN SUPPORT OF
APPLICATION**

**MEMORANDUM OF POINTS
AND AUTHORITIES**

DATE: May 16, 2011

TIME: 1:30 p.m.

COURTROOM: 9

1 **TO THE ABOVE ENTITLED COURT AND TO ALL DEFENDANTS**
2 **AND TO THEIR RESPECTIVE COUNSEL:**

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4 **PLEASE TAKE NOTICE** that Plaintiff Preston Smith submits the instant
5
6 Opposition to the Motion for Judgment on the Pleading of Defendant Officer
7 Gunn. When matters outside the pleadings are presented to the court for
8
9 consideration on a Motion for Judgment on the Pleadings, as in this case, the
10 Motion is converted to a Rule 56 Summary Judgment Motion. (F.R.C.P., Rule
11
12 12(c).) This Opposition is asserted on the grounds that there are triable issues of
13 fact which preclude granting the converted Judgment on the Pleadings.

14 Plaintiff's Opposition is based on the attached Declarations of Preston Smith
15
16 and Max A. Sauler, Esq., of the Law Offices of Manuel H. Miller, and the attached
17
18 Memorandum of Points and Authorities.

19 **PLEASE TAKE FURTHER NOTICE** that Plaintiff Preston Smith hereby
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21 applies to the above entitled court for an order either denying, deferring or
22 continuing the Motion for Judgment on the Pleadings of Defendant Burbank Police
23 Department Officer Gunn until discovery is complete. This application to deny,

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1 defer or continue the Defendant's Motion for Judgment on the Pleadings is made
2 pursuant to F.R.C.P., Rule 56 (d), for good cause shown, and was initially
3 presented to the court on April 22, 2011.
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6 DATED: April 26th, 2011

LAW OFFICES OF MANUEL H. MILLER

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9 By 
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Max A. Sauler, Esq.

11 Attorneys of Record of Plaintiff
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DECLARATION OF PRESTON SMITH

I, Preston Smith., declare and state as follows:

1. I am the Plaintiff in the above captioned action. I know the following facts of my own personal knowledge, except where stated on information and belief. If called upon and sworn as a witness, I could and would competently testify thereto.

2. On April 10, 2009 I was being questioned by City of Burbank Police Officers near a liquor store in the City of Burbank. After being questioned by the City of Burbank Police Officers I ran from the Police Officers.

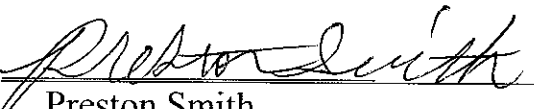
3. I was apprehended by the Police Officers and was tasered in my low back by Officer Gunn and at which point I fell to the ground immobilized. While lying on the ground, in a face down position, I told Officer Gunn that "OK, you've got me." I remained face down on the ground and I did not attempt to move or stand up. Officer Gunn continued to taser me a second and third time, causing me to go into convulsions. While I was still immobilized on the ground, I begged Officer Gunn "please don't shock me again." In response, Officer Gunn told me "f—k you, asshole, how do you like that, that will teach you to run," at which time

1 Officer Gunn tasered me a fourth and fifth time. Officer Gunn tasered me again
2 and then hit me a number of times with his flashlight.
3

4 4. City of Burbank Police Officer Baumgarten smashed his knee into my
5 back area. I do not at this point recall specifically what Officer Edwards did
6 although he was present.
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9 I declare under penalty of perjury pursuant to the laws of the State of
10 California that the foregoing is true and correct.
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14 Executed this 26th day of April, 2011, at Castaic, California.
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18 By 
19 Preston Smith
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DECLARATION OF MAX A. SAULER, ESQ.

I, Max A. Sauler, Esq., declare and state as follows:

1. I am an attorney licensed to practice law before the above entitled court. I know the following facts of my own personal knowledge, except where stated on information and belief. If called upon and sworn as a witness, I could and would competently testify thereto.

2. This action arises out of the alleged actions of Defendant police officers Gunn, Baumgarten and Edwards, and their employer/Defendant Burbank Police Department, in the course of, during and after the arrest of Plaintiff. This case was initially filed in the Los Angeles Superior Court and removed to this court at the request for removal by Defendants.

3. This case was set for trial to commence on November 8, 2011. Following Plaintiff's notice of the depositions of Defendants Gunn, Baumgarten and Edwards by Plaintiff, counsel for Defendants advised counsel for Plaintiff that because of an on-going Internal Affairs Investigation of the Defendant police officers arising out of the events giving rise to this lawsuit, the Defendants would not testify because of the potential for violations of their 5th Amendment rights.

1 4. Given the inability of Plaintiff to complete his discovery, the parties
2 entered into a Stipulation vacating the trial and vacating all pre-trial dates, which
3 was executed by this court on March 1, 2011.
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5 5. As part of the Stipulation (Para. 9 of the Stipulation) the court was
6 advised that, notwithstanding the proposed Stay, the Defendants wished to proceed
7 with the filing and hearing of Motions pursuant to F.R.C.P., Rule 12(c) on the issue
8 of whether the instant action is barred by *Heck vs. Humphrey* 512 U.S. 447, 114
9 S.Ct. 2364 (1994).
10

11 6. In the same Stipulation (Para. 10) the court was advised of Plaintiff's
12 contrary position, that the depositions of the individual Defendant police officers
13 must be completed before Plaintiff can oppose the Defendants *Heck* Motions. The
14 Order vacating the trial provided that Defendants *Heck* Motions would be heard on
15 May 16, 2011.
16

17 7. Plaintiff's counsel has been advised that the Internal Affairs
18 investigation arising out of the same set of facts giving rise to this action is still on-
19 going. After receipt of the Defendant's Motion for Judgment on the Pleadings the
20 undersigned faxed to Defendant's counsel his request that in view of the filing of
21 the *Heck* Motion that Plaintiff be permitted to depose the Defendant police
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1 officers. Counsel for Defendant Gunn responded that he would not permit his
2 client to be deposed.

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4 8. Plaintiff is unable to completely and substantively respond to
5 Defendant's *Heck* Motion for Judgment on the Pleadings without being able to
6 present the deposition testimony of the Defendant Police Officers. The
7 Defendant's *Heck* Motion is based on events that transpired in the course of,
8 during and after the arrest of Plaintiff. The Ninth Circuit case of *Hooper vs.*
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10 *County of San Diego*, 629 F.3d 1127 (9th Cir. 2011) [cited by Defendant Gunn in
11 his Motion for Judgment on the Pleadings] holds that facts surrounding the arrest,
12 and not merely the plea entered by the criminal defendant, may be considered by
13 the court in ruling on a *Heck* motion, depending on the circumstances of the arrest
14 and the alleged excessive force claim. Without the deposition testimony of the
15 Defendant Police Officers the Plaintiff is unable to fully and completely respond to
16 the Defendant's *Heck* Motion for Judgment on the Pleadings. Without their
17 deposition testimony, the Plaintiff is unable to inform the court of the facts and
18 circumstance of his arrest and the excessive force committed by the Defendants
19 during his arrest. Without this excessive force evidence, the court is unable to
20 make a determination whether "success in [Plaintiff's] § 1983 claim that excessive
21 force was used during [his] arrest would necessarily imply or demonstrate the
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1 invalidity of [his] conviction under § 1248 (a) (1).” Whether the chain of events
2 of his arrest and Plaintiff’s claim of excessive force is, or is not, one continuous
3 transaction, or whether it makes any difference given the holding in *Hooper*,
4 cannot be determined without the depositions of the Defendant Police Officers.
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7 9. In order to present the court with evidence of the events that
8 transpired during his arrest, the depositions of the Defendant Police Officers are
9 absolutely necessary. Without the testimony that the Defendant Police Officers
10 will provide the Plaintiff is unable to present material evidence of what transpired
11 during the course of his arrest and the continuing nature of the arrest, and is
12 therefore unable to fully and completely respond to the Defendant’s *Heck* Motion
13 for Judgment on the Pleadings.
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16 10. For all of the foregoing reasons, Plaintiff applies to this court for an
17 order either deny, deferring or continuing the Defendant’s *Heck* Motion to a future
18 date following the completion of the Internal Affairs investigation and after
19 Plaintiff has had an opportunity to depose Defendants Gunn, Baumgarten and
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1 Edwards. This application was initially present to the court on April 22, 2011, and
2 after attempting to resolve this issue with defense counsel.
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5 I declare under penalty of perjury pursuant to the laws of the State of
6 California that the foregoing is true and correct.
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9 Executed this 26th day of April, 2011, at Woodland Hills, California.
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12 By  _____
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14 Max A. Saulter, Esq.
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

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4 I

5 **UPON GOOD CAUSE SHOWN THE COURT MAY DEFER OR**
6 **CONTINUE A MOTION FOR JUDGMENT ON THE PLEADINGS**
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9 Defendant Gunn filed a F.R.C.P., Rule 12(c) Motion for Judgment on the
10 Pleadings and as part of that Motion asks that the court rely on documents beyond
11 the face of the Complaint. Defendant Gunn relies on the misdemeanor complaint,
12 the sentencing memorandum, the misdemeanor plea and the court transcript at
13 which Plaintiff entered his plea in support of his Motion for Judgment on the
14 Pleadings, all matters outside the scope of the pleadings. When matters outside the
15 pleadings are presented to the court for consideration on a Motion for Judgment on
16 the Pleadings, the motion is converted into a Rule 56 Summary Judgment Motion.
17 *Hal Roach Studios, Inc. vs. Richard Feiner & Co.* (9th Cir. 1990) 896 F.2d 1542,
18 1550.
19

20 F.R.C.P., Rule 12(d) provides:
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22 "RESULT OF PRESENTING MATTERS OUTSIDE
23
24 THE PLEADINGS. If, on a motion under Rule 12(b)(6)
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1 or 12 (c), matters outside the pleadings are presented to
2 and not excluded by the court, the motion must be treated
3 as one for summary judgment under Rule 56. All parties
4 must be given a reasonable opportunity to present all the
5 material that is pertinent to the motion.”
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8 Both a Rule 56 Summary Judgment Motion and a Motion for Judgment on
9 the Pleadings (that is converted to a Rule 56 Summary Judgment Motion) is
10 subject to being deferred or continued (or denied) to permit the opposing party to
11 obtain material discovery.
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14 F.R.C.P. Rule 56 (d) provides:

15 “When facts are unavailable to the nonmovant, if a
16 nonmovant shows by affidavit or declaration that, for
17 specified reasons, it cannot present facts essential to
18 justify its opposition, the court may:
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- 21 (1) defer considering the motion or deny
22 it;
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24 (2) allow time to obtain affidavits or
25 declarations or to take discovery; or
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27 (3) issue any other appropriate order.”
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II

A STATE COURT CONVICTION FOR RESISTING
ARREST MAY NOT BAR A SECTION 1983 CLAIM
FOR EXCESSIVE FORCE

The United States Supreme Court held in *Heck vs. Humphrey* 512 U.S. 447, 114 S.Ct. 2364 (1994) that where a criminal conviction arises out of the “same facts” as the basis for a subsequent 42 U.S.C. § 1983 claim, the 1983 claim must be dismissed. The Ninth Circuit has held that application of the *Heck* bar rests on finding that the criminal conviction (here for violation of California *Penal Code* § 148(a) for resisting arrest) arises out of the “same facts” as the 1983 claim. *Hooper vs. County of San Diego*, 629 F.3d 1127 (9th Cir. 2011).

Just as in the case as bench, the plaintiff in *Hooper* did not contest her guilty plea for violating Section 148(a)(1) nor did she dispute the lawfulness of her arrest. As with Plaintiff Smith, the *Hooper* plaintiff did contend that the defendant police officers used excessive force in response to her resistance.

Here, as pointed out in Section I, *supra*, discovery has not yet been conducted by Plaintiff as to the conduct of the Defendant Police Officers. Therefore, the Plaintiff has not yet conducted discovery material to the factual

1 issues that form the basis of Defendant's *Heck* Motion. Even absent this evidence,
2 it is Plaintiff's position that the factual circumstance giving rise to his excessive
3 force claim is separate and apart from the factual basis giving rise to his plea and
4 conviction for resisting arrest, and therefore, his claims for violation of 42 U.S.C. §
5 1983 and California *Civil* Code § 52.1, and his causes of action for Intentional
6 Infliction of Emotional Distress and Assault and Battery, are not barred by the
7 *Heck* decision.
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11 In this case, Plaintiff Preston Smith resisted arrest by fleeing the officers; he
12 resisted, delayed or obstructed the Defendant Police Officers. Once the Officers
13 had control of Preston Smith he was tasered even though he was under their
14 physical control and was not resisting arrest, giving rise to Plaintiff's claims.
15

16
17 In *Hooper, supra*, the court recognized that:

18 "[T]he California Supreme Court held that a conviction
19 under § 148(a)(1) can be valid even, if, in a single
20 continuous chain of events, some of the officer's conduct
21 was unlawful. *Yount vs. City of Sacramento*, 43 Cal.4th
22 885, 76 Cal.Rptr.3d 787 (2008). According to the Court,
23 a conviction under § 148(a)(1) requires only that some
24 lawful police conduct was resisted, delayed, or obstructed
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1 during the continuous chain of events.” (629 F.3d at
2 1131.)

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4 The *Hooper* court went on to recognize that *Yount* held that the plaintiff’s
5 “...claim was not *Heck*-barred because § 148(a)(1) contains no requirement that
6 there be a distinct temporal separation between the use of reasonable force and the
7 use of excessive force. If, at some time during the ‘continuous transaction’
8 between an individual an officer, the individual ‘resists, delays, or obstructs’, the
9 officer in the lawful performance of his or her duty, that is a violation of §
10 148(a)(1). The individual’s ‘resisting, delaying or obstructing’, the officer does
11 not lose its character as a violation of § 148(a)(1) if, at some other time during the
12 same ‘continuous transaction,’ the officer uses excessive force or otherwise acts
13 unlawfully.” (629 F.3d at 1132.) [Emphasis added.]

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18 The *Hooper* court determined that “[t]he question before us is the basic *Heck*
19 question – whether success in Hooper’s § 1983 claim that excessive force was used
20 during her arrest ‘would necessarily imply’ or ‘demonstrate’ the invalidity of her
21 conviction under § 148(a)(1). Given California law, as clarified in *Yount*, we hold
22 that it would not.” (629 F.3d at 1133.)

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25 The factual issues raised by Plaintiff’s excessive force claims, and whether
26 they are *Heck*-barred, must be viewed in a light most favorable to the party
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1 opposing the defendant's Motion (whether it is a Motion is for Summary
2 Judgment, or, as here, is Motion for Judgment on the Pleading that is converted to
3 a Motion for Summary Judgment).
4

5 Defendant Gunn argues that in the case at bench, "... the criminal record
6 demonstrates that Plaintiff violated *Penal* Code § 148(a)(1) during the entire period
7 of time that he interacted with Office Gunn." [Motion for Judgment on the
8 Pleadings, 6:17 – 19.] That is not the case. Other than the attached Smith
9 Declaration, the record before this court does not resolve the factual issues of the
10 timing of the sequence of events during the numerous times Smith was tasered. In
11 fact, the record presented by the moving party does not even mention that Officer
12 Gunn tasered Preston Smith, why the Plaintiff was tasered, how many times he
13 tasered the Plaintiff or when in the course of the chase, detention and arrest the
14 Plaintiff was tasered. Nor does it resolve the excessive force issues alleged to
15 have been perpetrated on the Plaintiff by the moving party. All of these factual
16 issues have to be addressed before a full hearing on Defendant's *Heck* Motion may
17 be had.
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24 The *Hooper* court unequivocally held that:

25 "[W]e conclude that a conviction under California
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27 *Penal* Code § 148(a)(1) does not bar a § 1983 claim for
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1 excessive force under *Heck* when the conviction and the
2 § 1983 claim are based on different actions during ‘one
3 continuous transaction.’” (629 F.3d at 1133.)
4

5 The *Hooper* case stands for the proposition that there need not be a distinct
6 temporal separation in the “continuous transaction.” Therefore, an arrest might be
7 initially lawful and later use of excessive force is actionable and not barred by
8 *Heck*.
9

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11 At the very least, the facts in the case at bench present triable issues of fact
12 preventing entry of either a Judgment on the Pleadings or a Summary Judgment.
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14 15 III

16 CONCLUSION

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19 For all of the foregoing reasons, this court should deny Defendant’s Motion
20 for Judgment on the Pleadings or, in the alternative, defer or continue Defendant’s
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1 Motion pending completion of the depositions of the Defendant Police Officers.
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4 DATED: April 26th, 2011

LAW OFFICES OF MANUEL H. MILLER

5
6
7 By



Max A. Sauler, Esq.
Attorneys of Record of Plaintiff

PROOF OF SERVICE
UNITED STATES DISTRICT COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

CASE NAME: PRESTON SMITH V. CITY OF BURBANK, ET AL.
CASE NUMBER: CV10-8840-VBF (AGR_x)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 20750 Ventura Blvd, Suite 440, Woodland Hills, CA 91364.

On April 26, 2011, I served the foregoing document described as:
PLAINTIFF'S OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS, APPLICATION FOR AN ORDER DENYING, DEFERRING OR CONTINUING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADING, DECLARATIONS OF PLAINTIFF PRESTON SMITH AND MAX A. SAULER, ESQ., IN SUPPORT OF APPLICATION, MEMORANDUM OF POINTS AND AUTHORITIES
, in this action by placing a true copy thereof in a sealed envelope addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

[X] BY MAIL

As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Woodland Hills, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing the affidavit.

[X] FEDERAL

I declare that I am employed in the office of a member of the bar of this Court at whose direction that service was made.

Executed on April 26, 2011, at Woodland Hills, California


Maryam Rance

1 2 3 4 5 6 7	Dennis A. Barlow, City Attorney Juli C. Scott, Chief Assistant City Attorney Carol A. Humiston, Senior Asst. City Attorney Office of the City Attorney 275 E. Olive Avenue P.O. Box 6459 Burbank, CA 91510-6459	Attorneys for Defendants
8 9 10 11 12 13	David D. Lawrence, Esq. Dennis M. Gonzalez, Esq. Nathan A. Oyster, Esq. Lawrence Beach Allen & Choi, PC. 100 W. Broadway, Suite 1200 Glendale, CA 91210-1219 Tel: 818-545-1925 Fax: 818-545-1937	Attorneys for Defendant